International Brotherhood of Electrical Workers, Local 48, AFL–CIO *and* ICTSI Oregon, Inc. and International Longshore and Warehouse Union, Local 8, AFL–CIO. Case 19–CD–080738

August 13, 2012

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. ICTSI Oregon, Inc. (ICTSI) filed a charge on May 10, 2012, alleging that International Brotherhood of Electrical Workers, Local 48, AFL–CIO (IBEW) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing ICTSI to assign certain work to employees represented by IBEW rather than to employees represented by the Intervenor, International Longshore and Warehouse Union, Local 8, AFL–CIO (ILWU). A hearing was held on May 24, 25, 29, and 30, 2012, before Hearing Officer Jessica Dietz.[1] Thereafter, ICTSI, IBEW, and ILWU each filed a posthearing brief. Additionally, the Port of Portland filed a brief as amicus curiae.

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The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, we make the following findings.[2]

I. JURISDICTION

The parties stipulated that ICTSI is an Oregon corporation engaged in operating a cargo handling terminal at the Port of Portland in Portland, Oregon. The parties also stipulated that during the last 12 months, a representative period, ICTSI received gross revenues valued in excess of $500,000, and purchased and received goods valued in excess of $50,000, at its Portland, Oregon location directly from suppliers outside of the State of Oregon. The parties further stipulated, and we find, that ICTSI is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that IBEW and ILWU are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

In 2011, ICTSI entered into a 25-year lease with the Port of Portland (the Port) to operate the dock at terminal 6, a marine cargo terminal at the Port. Terminal 6 operations include handling various types of containers, including refrigerated containers (commonly referred to as "reefers"). Reefers are used to move sensitive products such as food or industrial materials that must be kept at a particular temperature. Reefers run on electricity and have cords with plugs that must be plugged into electrical outlets. They must be monitored to ensure that the refrigeration process is working properly and the contents are not spoiling. The plugging, unplugging, and monitoring of reefers (also called reefer work) is the work in dispute. IBEW-represented employees employed by the Port have performed this work since terminal 6 operations began in 1974. This work is performed under a collective-bargaining agreement between the Port and the District Council of Trade Unions (DCTU). IBEW is part of the DCTU. ICTSI does not have a collective-bargaining relationship with IBEW.

According to the testimony of Sam Ruda, the Port's chief commercial officer, the Port insisted during lease negotiations with ICTSI that certain work that had for many years been performed by Port employees pursuant to the Port's labor agreement with DCTU (DCTU Agreement) continue to be the Port's responsibility. According to Ruda, it was the Port's position that "historic work jurisdictions be maintained" when the "new terminal operator took over the facility." As a result, the Port required in its lease proposal that DCTU-represented employees continue to perform the work they had historically performed at terminal 6. To that end, Section 2.8 of the lease expressly provides that ICTSI acknowledges "that the DCTU Work is subject to the DCTU's jurisdiction under the DCTU Agreement" and ICTSI cannot perform "at the Terminal any DCTU Work . . . or . . . undertake any action that would cause the Port to be in violation of the terms of the DCTU Agreement."[3] Section 3.23(a) of the lease provides that, for so long as the DCTU Agreement remains in effect, DCTU-represented

[1] On the first day of the hearing, ILWU moved to quash the notice of 10(k) hearing. The hearing officer received evidence on the motion but left its resolution to the Board.

[2] On July 23, 2012, ILWU filed a motion to reopen the record. The motion was filed for the purpose of presenting evidence of agreements made among ICTSI, IBEW, and the Port in three related court proceedings. Significantly, counsel for ICTSI explained that ICTSI entered into these agreements with IBEW and the Port to "induce the ILWU to cease its current job actions at Terminal 6 so that the terminal can get back to normal production . . . ." Further, these agreements will be terminated if the Board awards the disputed work to IBEW-represented employees. We find that these agreements do not provide any evidence that is relevant in determining this jurisdictional dispute. Accordingly, we deny the motion to reopen the record on the ground that the additional evidence sought to be adduced would not require a different result. See Sec. 102.48(d) of the Board's Rules and Regulations.

[3] Pursuant to the lease, the "DCTU Work" is defined as "the work to be undertaken by the Port at the Terminal by the DCTU employees subject to the DCTU Agreement."

employees of the Port must continue to perform all DCTU work covered by the Agreement. Ruda testified that the lease requires that the reefer work continue to be performed by the Port's IBEW-represented electricians. Jim Mullen, the current terminal manager for ICTSI, similarly testified that the lease did not permit it to assign reefer work to ILWU.

After ICTSI entered into the lease, it became a member of the Pacific Maritime Association (PMA).[4] As a PMA member, ICTSI became subject to the Pacific Coast Longshore Contract Document (PCLCD), a multiemployer collective-bargaining agreement between PMA and ILWU. The most recent PCLCD is effective from July 2008 to July 2014.

ILWU also has a collective-bargaining agreement with the Port (ILWU-Port Agreement), which was entered into in 1984. The ILWU-Port Agreement includes the provision**:** "All practices regarding jurisdictional lines with other labor organizations shall be observed." ILWU Secretary-Treasurer Bruce Holte testified that the ILWU-Port Agreement has never been terminated.

Beginning in about the mid-2000s, ILWU began making informal claims that the plugging, unplugging, and monitoring of refrigerated containers on docks should be performed by ILWU members. In 2008, ILWU began filing grievances against the prior operator of terminal 6 over this issue. Once ICTSI engaged in lease negotiations with the Port in 2010, and took over operation of terminal 6 in 2011, ILWU made verbal and written demands for the disputed work to be assigned to ILWU-represented employees. ICTSI responded by informing ILWU that ICTSI had no authority to control or assign the disputed work, and was required under its lease with the Port to utilize Port employees represented by IBEW to perform the work. From March through May 2012, ILWU filed 10 grievances contending that ILWU-represented employees had lost work due to ICTSI's use of IBEW-represented employees to perform the reefer work. When IBEW learned of these grievances, it threatened to picket ICTSI if the disputed work was taken from IBEW-represented employees and given to ILWU-represented employees.

On May 23, 2012, the Coast Labor Relations Committee (CLRC), a joint committee comprising representatives of PMA management and ILWU officials, held a meeting at which the grievances were settled. Neither ICTSI nor IBEW was invited to this meeting or notified that it was taking place. As a result of the meeting, the CLRC issued minutes which "instructed [ICTSI] to assign the subject work to ILWU represented personnel in accordance with the PCLCD and this CLRC agreement."

B. Work in Dispute

The work in dispute is the plugging, unplugging, and monitoring of refrigerated cargo containers for ICTSI at terminal 6 of the Port of Portland, in Portland, Oregon.

C. Contentions of the Parties

In its posthearing brief, ILWU contends that the Board should quash the notice of hearing because ICTSI and IBEW argue that the assignment of work is controlled by the Port, which is not an employer under Section 2(2) of the Act. ILWU further asserts that it follows that the Port electricians represented by IBEW are not statutory employees under Section 2(3) of the Act. In addition, ILWU contends that there is no valid jurisdictional dispute because ILWU has a work preservation claim to the work and because ICTSI and IBEW argue that the dispute turns on ICTSI's commercial lease with the Port. Alternatively, ILWU maintains that, if the Board reaches the merits of assigning the work in dispute, it should award the work to ILWU-represented workers based on the factors of certifications and collective-bargaining agreements, ICTSI preference, area and industry practice, and economy and efficiency of operations.

ICTSI, IBEW, and amicus Port assert that a jurisdictional work dispute is properly before the Board for resolution. In particular, they contend that the Port's status as a public sector employer does not deprive the Board of jurisdiction to resolve the dispute because ICTSI is a covered employer under the Act and is the object of alleged unlawful coercion by IBEW. ICTSI and IBEW further contend that the Board should award the work to IBEW-represented employees on the basis of collective-bargaining agreements, ICTSI preference, current assignment and past practice, area and industry practice, and economy and efficiency of operations.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires finding that there is reasonable cause to believe that: (1) there are competing

[4] At the hearing, the PMA made a motion to intervene. The hearing officer denied the motion, finding that PMA's interests would be adequately represented by the existing parties to the hearing. PMA has filed a request for special permission to appeal the Regional Director's denial of its motion to intervene, accompanied by an appeal of such denial and the Regional Director's denial of the motion to quash the 10(k) hearing. PMA's request is denied inasmuch as the record and briefs herein adequately present the issues before the Board and the positions of the parties. PMA has made the same claims as ILWU in arguing that the Board should quash the notice of hearing. PMA has not proffered any additional facts which might affect the outcome of this jurisdictional dispute.

claims to the disputed work between rival groups of employees; (2) a party has used proscribed means to assert its claim to the work in dispute; and (3) the parties have not agreed on a method of voluntary adjustment of the dispute. See, e.g., *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004).

On this record, we find that the standard has been met. The parties stipulated that both ILWU and IBEW claim the work in dispute on behalf of employees they represent. There is reasonable cause to believe that IBEW used means proscribed by Section 8(b)(4)(D) to assert its claim. In its May 10, 2012 letter, IBEW threatened to picket ICTSI or take other economic action if the disputed work was not assigned to its members, and there was no evidence that it would not carry out the threats. Threatening to picket is a proscribed means of enforcing a claim to disputed work. *Operating Engineers Local 137 (Eastern Concrete Materials)*, 355 NLRB 330, 332 (2010) (reasonable cause to believe that Operating Engineers and Teamsters used proscribed means to enforce their claims to disputed work when they threatened to picket and engage in job actions if the employer reassigned disputed work to employees represented by Laborers). The parties stipulated that there was no agreed-upon method for voluntary adjustment of the dispute.

We find without merit ILWU's contention that there is no violation of Section 8(b)(4)(D) because the dispute concerns the assignment of work by public employer Port to its own employees, who are excluded from coverage by the Act. Although ICTSI does not directly employ the employees who are performing the disputed work, Section 8(b)(4)(D) is applicable because in a 10(k) case, the Board need have jurisdiction only over the employer that is the target of a respondent union's unlawful conduct. See, e.g., *Plumbers Local 195 (Gulf Oil)*, 275 NLRB 484 (1985), and *Longshoremen ILA Local 1911 (Cargo Handlers)*, 236 NLRB 1439 (1978).[5] Here, as set forth above, there is reasonable cause to believe that IBEW threatened to picket ICTSI with an object of forcing ICTSI not to cause reassignment of the disputed work from employees represented by IBEW to employees represented by ILWU.[6]

We also reject ILWU's argument that there is no valid jurisdictional dispute because ILWU has a work preservation claim to the work. IBEW-represented electricians have been performing the disputed work since 1974. Where, as here, a union is claiming work for employees who have not previously performed it, the objective is not work preservation, but work acquisition. The Board will resolve that dispute through a 10(k) proceeding. See, e.g., *Teamsters Local 174 (Airborne Express)*, 340 NLRB 137, 139 (2003); *Stage Employees IATSE Local 39 (Shepard Exposition Services)*, 337 NLRB 721, 723 (2002). We thus find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated, and that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work based on the evidence presented by the parties. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. E.g., *Machinists Lodge 1743 (J. A. Jones Construction Co.)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Board certifications

ILWU relies on a Board certification in *Shipowners' Assn. of the Pacific Coast*, 7 NLRB 1002 (1938), in which the Board certified ILWU as the representative of "workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members of . . . Waterfront Employers Association . . . ." ILWU argues that the disputed work is traditional ILWU work covered by the Board's certification. However, the work at issue did not exist at the time of the 1938 certification, and the unit employees were those of a multiemployer association other than the PMA. Accordingly, this factor is not entitled to any weight in determining which group of employees is entitled to perform the work in dispute.

[5] As the Board has explained in *Gulf Oil*:

> Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to engage in proscribed activity with an object of "forcing or requiring *any employer* to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." (Emphasis added.) The Board has interpreted this language as showing the "clear intent of Congress to protect not only employers whose work is in dispute from such [proscribed] activity, but *any* employer against whom a union acts with such a purpose." [*Gulf Oil*, 275 NLRB at 485, citing *Cargo Handlers*, 236 NLRB at 1440.]

[6] Given the evidence that IBEW threatened ICTSI, ILWU erroneously relies on *Electrical Workers Local 3*, 219 NLRB 528 (1975) (quashing notice of hearing where work stoppages were directed at the nonstatutory employer and there was no evidence of any threats or other proscribed conduct being directed at the statutory employer).

2. Collective-bargaining agreements

Both IBEW and ILWU are party to collective-bargaining agreements that cover the disputed work. The DCTU Agreement, to which IBEW and the Port are bound, states in pertinent part that it covers "all construction, demolition, installation and maintenance assignments which have been historically and consistently performed by employees covered under this Agreement at all marine cargo handling facilities owned and operated by the Port, including any marine cargo handling facilities leased and operated by the Port." The "scope of [the DCTU Agreement] shall include any marine cargo handling facilities leased by the Port to an independent contractor to the extent the Port retains the responsibility for the maintenance or repair of any such leased facility or facilities." As the Port retained maintenance and repair responsibilities for terminal 6 under its lease with ICTSI and as the disputed work has historically been performed by DCTU employees, the DCTU Agreement covers the disputed work.

In addition, Section 5(d) of the ILWU-Port Agreement, executed at a time when IBEW employees performed the work in dispute, contains language specifying that ILWU must respect the existing jurisdictional lines with other labor organizations.

As set forth above, ICTSI is bound to the PCLCD. Sections 1.7 and 1.71 of the PCLCD describe the scope of work and ILWU's jurisdiction as the "maintenance and repair of containers of any kind" and "maintenance and repair of all stevedore cargo handling equipment" used by PMA-member companies. However, in jurisdictional disputes, the relevant collective-bargaining agreement is the one negotiated with the employer who has ultimate control over the assignment of the disputed work. *Elevator Constructors Local 91 (Otis Elevator Co.)*, 340 NLRB 94, 96 (2003). Here, the record evidence shows that the work in dispute is performed by IBEW-represented Port employees pursuant to the terms of the DCTU. The Port's lease makes clear that ICSTI cannot perform "at the Terminal any DCTU Work . . . or . . . undertake any action that would cause the Port to be in violation of the terms of the DCTU Agreement."[7] Because ICTSI has no authority to control the disputed work, the PCLCD is not relevant: it applies only to maintenance and repair work directed or controlled by a PMA-member employer. We therefore find that the factor of collective-bargaining agreements favors awarding the disputed work to employees represented by IBEW.

[7] Indeed, in contending that there is no valid jurisdictional dispute because the dispute concerns the assignment of work by a public employer to its own employees, ILWU has effectively acknowledged that ICTSI has no authority to assign the work under its lease with the Port.

3. Employer preference and past practice

It is undisputed that IBEW-represented employees employed by the Port have continuously performed the work at issue since the terminal began operations in 1974. The evidence showed that the Port prefers that the work in dispute continue to be assigned to its employees represented by IBEW. As set forth above, the Port reserved the work for its IBEW-represented electricians under its lease with ICTSI. Because the Port is the employer in control of the work in dispute and its employees are performing that work, we look to its past practice and preference in assigning the work.[8] Moreover, we note that ICTSI agrees with the Port that the disputed work should continue to be assigned to employees represented by IBEW. Thus, we find that this factor favors awarding the disputed work to those employees.

4. Area and industry practice

The record presents conflicting evidence on this factor. ILWU presented testimony indicating that employees it represents perform the disputed work at most of the approximately 30 container facilities on the West Coast. However, there was also testimony and documentary evidence that, under the PCLCD, many of the port facilities on the West Coast, such as the Port of Oakland, were excluded from ILWU's jurisdiction, and ILWU does not perform reefer work at those facilities. There was no evidence that IBEW performs the disputed work except at terminal 6. Based on the evidence presented, this factor does not favor an award of the work in dispute to employees represented by either union.

5. Relative skills and training

The record shows that the employees represented by both Unions are qualified to perform reefer work. Therefore, this factor does not favor awarding the disputed work to employees represented by either Union.

6. Economy and efficiency of operations

ICTSI's terminal manager testified that he believed using ILWU-represented employees to perform the disputed work would be more efficient because they do all of the other work associated with a reefer. See, e.g., *Laborers (Eshbach Bros., LP)*, 344 NLRB 201, 204 (2005) (the factor of economy and efficiency of operations favored the Laborers where they were performing other work on the project, aside from the disputed work).

IBEW asserts that it is more economical and efficient for IBEW-represented employees to continue to perform the disputed work because they have been doing this work since 1974. See, e.g., *Electrical Workers Local 47*

[8] *Painters District Council 9 (Apple Restoration)*, 313 NLRB 1111, 1112 fn. 5 (1994).

(Pouk & Steinle, Inc.), 353 NLRB 1074, 1077 (2009) (the factor of economy and efficiency of operations favored an award of the work in dispute to employees represented by IBEW where IBEW locals had been doing the disputed work for many years). Further, IBEW, citing documentary evidence, contends that its employees can perform the reefer work faster than employees represented by ILWU. IBEW also points to testimony that it would cost ICTSI more per hour to use ILWU-represented employees. However, in assessing the factors of economy and efficiency of operations, the Board does not consider wages to be relevant. *Longshoremen ILA Local 1242 (Rail Distribution Center*), 310 NLRB 1, 5 fn. 4 (1993). We find that the record does not contain sufficient evidence to find that the factor of economy and efficiency of operations favors one group of employees over the other.

Conclusion

After considering all the relevant factors, we conclude that employees represented by IBEW are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements and employer preference and past practice. We note that the factor of employer preference, although not itself determinative, is entitled to substantial weight. See *Iron Workers Local 1 (Goebel Forming)*, 340 NLRB 1158, 1163 (2003). In making this determination, we are awarding the disputed work to employees represented by International Brotherhood of Electrical Workers, Local 48, AFL–CIO, not to that labor organization or its members. This determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees represented by International Brotherhood of Electrical Workers, Local 48, AFL–CIO are entitled to perform the plugging, unplugging, and monitoring of refrigerated cargo containers for ICTSI at Terminal 6 of the Port of Portland, in Portland, Oregon.